In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-778

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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Opinions Below

The August 21, 1979 decision of the Court of Appeals is officially reported at 604 F.2d 106 and appears as Appendix E of the Petition for a Writ of Certiorari (hereinafter Pet. for Cert.). A prior decision of the Court of Appeals,

officially reported at 569 F.2d 169 (Appendix A of the first Pet. for Cert.), was vacated by the Supreme Court on November 13, 1978 (No. 77-1792). The Supreme Court's Order appears as Appendix A of the second Pet. for Cert.

The first decision of the District Court for the District of New Hampshire was not officially reported, but was unofficially reported at 14 FEP Cases 1220 (1977). Affirmed twice now by the Court of Appeals, the decision appeared as Appendix B of the first Pet. for Cert. It now appears as Appendix F of the second Pet. for Cert.

This Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case for reconsideration by the Court of Appeals in a majority *per curiam* opinion in which four members of the court dissented. The opinion is officially reported at 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978) and appears as Appendix A of the Pet. for Cert.

By an order dated December 19, 1978, appearing as Appendix B of the Pet. for Cert., the Court of Appeals remanded the case to the District Court for further proceedings.

By orders dated January 29 and February 20, 1979, appearing as Appendix C and Appendix D of the Pet. for Cert., the District Court reaffirmed its original opinion and findings in all respects. None of those orders is officially reported.

Jurisdiction

The judgment of the Court of Appeals affirming the District Court's original judgment was entered on August 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the methodology for proving an individual Title VII discrimination claim established by *McDonnell Douglas* v. *Green* and *Furnco Construction Corp.* v. *Waters*[1] require abandoning the customary "clearly erroneous" standard in favor of *de novo* review of a District Court's finding of discrimination.

2. Can the defendants be heard to complain that the District Court upon remand made no additional findings when in fact defendants asked for none?

3. Does a *McDonnell Douglas* v. *Green – Furnco* analysis require direct evidence of discriminatory intent in an academic promotion case even though such a burden is not placed upon a plaintiff in any other employment discrimination context under Title VII?

Statute Involved

The substantive federal statute involved here is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The applicable provision, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) reads:

> "Sec. 703(a). It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privi-

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[1] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 36 L.Ed. 668, 93 S.Ct. 1817 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 57 L.Ed. 957, 98 S.Ct. 2943 (1978).

leges of employment, because of such individual's race, color, religion, sex, or national origin. . . .''

Statement of the Case

Respondent, Christine M. Sweeney (hereinafter plaintiff), has now twice succeeded before both the District Court and the Court of Appeals in demonstrating that she was denied promotion to full professor of education at Keene State College for the 1974-75 academic year because of her sex.[2] Both the District Court and the Court of Appeals announced in their original decisions that the controlling legal test was to be found in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 36 L.Ed. 668, 93 S.Ct. 1817 (1973).[3] (F-2;[4] 569 F.2d at 177) The Court of Appeals

[2] Prior to instituting action in the District Court, the plaintiff had filed discrimination charges with the New Hampshire Commission for Human Rights and the EEOC (Equal Employment Opportunity Commission). After a lengthy investigation by the Commission, it found probable cause on May 2, 1975, as did the EEOC on October 19, 1976. (App. IV 121-22, Exs. 53, 54; see n. 4, *infra*). Although the original complaint asserted additional claims, these have been resolved. The remaining action focuses on Dr. Sweeney's promotion claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[3] Under *McDonnell Douglas,* an individual Title VII plaintiff may proceed by first establishing a ''prima facie case'' of discrimination; this then requires the defendant to ''articulate'' a legitimate, non-discriminatory reason for its adverse action regarding the plaintiff. To prevail, the plaintiff ultimately must prove that the reason given is a pretext for discrimination. *See* 411 U.S. at 802-05. *Furnco Construction Co.* v. *Waters,* 438 U.S. 567, 57 L.Ed. 2d 957,, 98 S.Ct. 2943 (1978), affirming the *McDonnell Douglas* methodology, had not yet been decided by this court.

[4] The appendices of the present Pet. for Cert. are cited as ''A'', ''B'', ''C'', etc. The appendix prepared for the second appeal to the Court of Appeals is cited as ''App.'' Appendices prepared for the first appeal, constituting Vol. I-IV, are referenced as ''App. I-IV'', etc.

affirmed the District Court's lengthy (26 pages in Appendix F, including 13 Specific Findings) decision in favor of the plaintiff in a detailed decision of its own.

What caused the Supreme Court to vacate the Court of Appeals' original decision was language accompanying the discussion of defendants' obligation to ''articulate'' a legitimate reason for Dr. Sweeney's non-promotion once plaintiff had established a prima facie case. The Court of Appeals stated that defendants were required ''to prove absence of discriminatory motive'' at the second phase of the test. 569 F.2d at 177. In remanding the case to the Court of Appeals, the Supreme Court reemphasized the language and rule of *McDonnell Douglas,* 411 U.S. at 802, and *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978), that a Title VII defendant need only ''articulate'' a valid reason, and indicated that defendants had done so. (A-1) The Court was concerned that the Court of Appeals had ''imposed a heavier burden on the employer than *Furnco* warrants.''[5] (A-2)

The Court of Appeals remanded the case to the District Court on December 19, 1978 (with First Circuit Court of Appeals Judge Hugh Bownes, who had heard the case as District Judge, sitting by designation) ''for further proceedings and reconsideration in the light of *Furnco*. . . .'' (App. 4) Although the Petitioners (hereinafter defendants) now strenuously complain that Judge Bownes made no additional ''subsidiary'' findings, they made no such request during the more than six weeks that the case was again before the District Court; in fact, from December 19,

[5] The four dissenting Justices (Justices Stevens, Brennan, Stuart and Marshall) took the position that there was no real distinction between ''articulat[ing] a nondiscriminatory reason'' and ''prov-[ing] absence of a nondiscriminatory motive,'' since, irrespective of the shifting burden of adducing evidence by submitting proof, the ultimate burden of persuasion rested with the plaintiff. (A-3-7)

1978 to February 7, 1979 (a date subsequent to Judge Bownes' second opinion), the defendants made *no request for a hearing or other proceeding* before the District Court. (D-1) However, Judge Bownes *did* reconsider the case in the light of *Furnco,* and issued an order, saying in part:

> Defendants did adduce evidence of legitimate nondiscriminatory reasons for not promoting plaintiff. Plaintiff then proved to my satisfaction that the basic reason for the failure to promote her was because of her sex, that the reasons advanced by the defendants were pretextual, and that plaintiff would have been promoted in the academic year 1974-75 but for the fact that she was a woman.
>
> My opinion an findings are in all respects reaffirmed. (C-1-2)

On February 26, the defendants filed a Notice of Appeal (App. 26), bringing the matter before the Court of Appeals for the second time.

The Court of Appeals said it would not, however, consider the evidence *de novo,* but would follow the standard appellate practice of not overturning the findings of the trial court unless "clearly erroneous." The reason given by the Court was that the trial judge was in a better position to judge credibility of witnesses "where the issue is whether 'personality' reasons were sexually biased." (E-3-4, & n. 2) However, the Court also said that it would look closely for infection in the Court's findings from legal error. (E-4, n. 2)

The Court of Appeals focused on the second and third stages of proof under the *McDonnell Douglas – Furnco* approach, namely whether the alleged reasons for Dr. Sweeney's non-promotion were a pretext for sex discrimination. Although Dr. Sweeney had the full support of her

peers in the Education Department, importantly she did not have the support of Department Chairman Walter St. John, when she applied for promotion for the 1974-75 academic year.[6] The Court of Appeals from its close review of the record found possible sex bias in Department Chairman St. John's perception of women faculty members:

> In both 1974-75, by Dr. St. John's own admission, and in 1975-76, Sweeney had the support of her department's evaluation committee. The significant difference was that the 1974-75 department chairman did not endorse the committee's recommendation, whereas the 1975-76 chairman did. The district court could have concluded that St. John undermined the committee's recommendation and, on the basis of the evidence reviewed herein, that his criticism of Sweeney was determined by a subtle, if unexpressed, bias against women faculty.
>
> . . .
>
> Eleanor Vanderhagen testified that Dr. St. John was involved in the publication of a newsletter by the Education Department that carried an announcement about an all-male honor education fraternity. When Vanderhagen wrote to him "pointing out its role in professional advancement for careers for men and women" and tried to meet with him to discuss her feeling that this was "inappropriate for a college publication," St. John replied that he was "unavailable" and left a message that he "considered the whole thing trivial." There was also evidence, which the court below was entitled to credit, that St. John was condescending toward women and had been discourteous to Sweeney from the first time they met. (E-12-13, n. 12 & n. 13)

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[6] Dr. Sweeney had sought promotion for the 1972-73 academic year. Denial for that year is no longer an issue in this case. On her third try, for the 1975-76 academic year, she was successful.

At her next promotional hurdle, Dr. Sweeney encountered the all-male, senior faculty, FEAC (Faculty Evaluations Advisory Committee). They turned her down, saying only that she did not qualify. (E-5) Not until the FAC (Faculty Appeals Committee) insisted that she be given reasons for the adverse decision was the following "explanation" developed by President Redfern and Dean Davis, the ultimate decision-makers in the promotion process and among the defendants herein:

> The evidence shows that [President Redfern] told Sweeney that the reasons were largely personal ones: that the FEAC members thought that she "personalized professional matters," was rigid, narrow-minded, and inflexible, intolerant of students' views and "old fashioned" in her supervision of student teaching. Her alleged concern with the height of window shades was cited as an example.
>
> . . .
>
> The reasons given for the 1974-75 denial of Sweeney's promotion thus were, in essence, that Sweeney had a tendency to be narrow-minded and rigid, to personalize professional matters, and to be difficult to work with. (E-5-6)

The Court of Appeals then considered the question of *credibility*: were the reasons advanced by administration members for non-promotion the "real reasons" or were they mere pretexts? (E-7) Relevant to the court's conclusion that they were "pretexts" was Dr. Sweeney's testimony that her later promotion for the 1975-76 year was in response to her complaint of sex discrimination; testimony of faculty members that she was *not* rigid, old fashioned, or narrow-minded and did not personalize professional

matters; testimony that the College had already granted her tenure, indicating that the alleged "personality" problems had not impeded her from becoming a permanent faculty member; testimony that she was as well qualified for promotion by objective criteria (such as teaching ability, publications, and committee work) as men who were in fact promoted to the senior ranks; and testimony that her credentials were essentially unchanged from the year of her denial to the year of her promotion. (E-7-10)

The Court of Appeals observed:

> Defendants argue that Sweeney did no more than show that differences of opinion existed between members of the faculty at Keene and that she did not show that the 1974-75 FEAC acted out of sex bias. We fully agree that the issue is not whether Sweeney was qualified for promotion or should have been promoted in 1974-75 by some objective measure, but whether she was denied a promotion because of her sex. *Loeb* [v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979)], slip op. at 16. The recommendation of the 1974-75 FEAC is entitled to stand even if it appears to have been misguided, unless it was sex biased. *Loeb*, slip op. at 11 n.6, 16.
>
> While Keene State's faculty members were entitled to hold different opinions as to Sweeney's qualifications, the evidence and testimony just reviewed suggests that more than just differences of opinion were involved. The defendants' alleged reasons border on describing Sweeney as, to quote plaintiff's brief, a "schoolmarm." The focus on her alleged attention to the height of window shades in particular seems a trivial comment. In light of the evidence that Sweeney's personality was not as described by Redfern and did

not interfere with her ability to work on committees or with people, the district court could have concluded that the five male members of FEAC would not have fastened upon such reasons had Sweeney been a man. (E-10-11)

The Court then focused on more general, administration-wide discrimination, which it said added "color" to the plaintiff's claim of discrimination:

> The nature of the reasons given, and the evidence introduced to show that they were either insubstantial or fictitious, stood with more general evidence suggesting that women at Keene State were evaluated by a stricter standard than their male colleagues, and that the institution generally was unresponsive to the concerns of its female faculty. Much of this evidence—such as the statistical composition of the faculty and the attitude of the affirmative action officer—is recounted in our original opinion, 569 F.2d at 178-79. While by itself it does not prove that Sweeney in particular was a victim of discrimination, it does add "color" to the decision-making process at Keene State and to the reasons given for Sweeney's non-promotion. Proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual, but evidence of such an atmosphere may be considered along with any other evidence bearing on motive in deciding whether a Title VII plaintiff has met her burden of showing that the defendants' reasons are pretexts. *See Furnco,* 438 U.S. at 580; *Loeb,* slip op. at 17 n. 14. We think that it was open to the court to conclude from the totality of the evidence that the reasons given for Sweeney's nonpromotion in 1974-75 were implicitly influenced by the fact that Sweeney was a woman.[7] (E-11-12)

The Court discounted the defendants' claim regarding lack of discriminatory animus on the part of the decision makers, saying:

> Although there was no direct evidence, we think that the district court could have inferred that FEAC and Dr. St. John were sex biased in light of the nature and weakness of the reasons given for her non-promotion coupled with the evidence of the statistical composition and general character of the institution and of the insensitivity of many—including St. John—to the concerns of the female faculty. (E-12-13)

In short, the Court of Appeals concluded that sex bias formed a built-in headwind, impeding Dr. Sweeney's promotion, and found that "Sweeney would have been promoted had she been evaluated against the standard that was applied generally to men." (E-14)

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[7] The first decision of the Court of Appeals contained additional language not repeated in the second opinion. It made the following statement based on *McDonnell Douglas* concerning the plaintiff's burden of showing pretext:

> In suggesting the kinds of evidence which would be relevant in proving that the employer's refusal to rehire was a pretext, the Court listed an employer's general policy and practice with respect to minority employment, prior treatment of the plaintiff, and statistics. 411 U.S. at 804-05.

The Court of Appeals then evaluated plaintiff's statistical evidence showing that a double standard existed at the college, excluding women from the upper faculty ranks; took note of the inactivity of the so-called Affirmative Action Program at the college and the program coordinator's lack of concern for Dr. Sweeney's complaints; and reviewed testimony of expert and lay witnesses regarding sex bias and treatment of women on campus.

Argument

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE HAS NOW BEEN RECONSIDERED IN THE LIGHT OF *Furnco Construction Corp.* v. *Waters* AND NO NEW SIGNIFICANT LEGAL ISSUES HAVE BEEN RAISED BY THE OPINIONS BELOW.

a. *The "Clearly Erroneous" Test For Reviewing A District Court's Findings Was Impliedly Approved By* McDonnell Douglas v. Green *and* Furnco Construction Corp. v. Waters, *It Is Used Consistently By The Circuits In Evaluating The Evidence In Individual Title VII Claims And Petitioners Present No Compelling Argument For Abandonment Of This Standard Of Review In Favor Of De Novo Review.*

The defendants continue to be dissatisfied with the finding in this case that the plaintiff would have been promoted but for her sex and now have proposed that the widely-adopted "clearly erroneous"[8] standard of appellate review should not be applied to Title VII claims. Defendants' position is without merit. The "clearly erroneous" rule was employed in *McDonnell Douglas* and *Furnco,* was followed throughout the history of the instant case, and has been almost universally observed by the Circuits, including the Fifth and Seventh, in evaluating the claims of individual plaintiffs in Title VII actions. The defendants present no persuasive reasons for this Court's imposition of a less appropriate standard of *de novo* review.

Both *McDonnell Douglas* and *Furnco* reached the Supreme Court on the "clearly erroneous" standard of review. *See Green* v. *McDonnell Douglas Corporation,* 463 F.2d 337 (8th Cir. 1972); *Waters* v. *Furnco Construction Co.,* 551 F.2d 1085 (7th Cir. 1977). This Court announced rules concerning the order and allocation of proof for individual Title VII claims in the *McDonnell Douglas* and *Furnco* cases, but significantly did not suggest anything but that the "clearly erroneous" standard of review was appropriate once the correct rules of law were applied to the facts as found. The defendants in this case did not question the standard of review until the second appeal of the District Court's decision. (Reply Brief for Defendants-Appellants, at 8-11) Although this Court directed the Court of Appeals to reconsider the facts in this case in the "light of *Furnco*" (A-2) it specifically expressed "no view" regarding the outcome of the case once the correct rule of law had been applied to the facts (A-2, n.1) and impliedly approved the "clearly erroneous" standard of review employed by the First Circuit in its first decision. 569 F.2d at 176, n. 12.[9]

Additionally, the "clearly erroneous" standard of review has been explicitly or implicitly followed in academic tenure or promotion decision cases similar to the one at hand. *See, e.g., Faro* v. *New York University,* 502 F.2d 1229 (2nd Cir. 1974); *Green* v. *Bd. of Regents of Texas Tech Univer-*

[8] FED. R. CIV. P. 52(a) provides in part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

[9] When this case was before the Court of Appeals for a second time, upon remand by this Court, it was in a posture identical to that of *McDonnell Douglas* upon remand, when the Court of Appeals said:

> In effect the Supreme Court, in view of the employer's statement as to its reason for discharge, stated that the employer had satisfactorily offered rebuttal evidence to the prima facie case and that the remaining issue . . . was whether the employee could demonstrate that petitioner's assigned reason was pretextual or discriminatory in its application. The issue on remand was factual and quite narrow. We are bound by the "clearly erroneous" standard found in Fed. R. Civ. P. 52(a). *Green* v. *McDonnell Douglas,* 528 F.2d 1102, 1104 (8th Cir. 1975).

sity, 474 F.2d 594 (5th Cir. 1973) (suit under § 1983); *cf. Powell* v. *Syracuse University,* 580 F.2d 1150, 1156 (2nd Cir. 1978). Other plaintiffs claiming discrimination, including those bringing actions under Title VII, have seen their fortunes rise or fall under the "clearly erroneous" standard of re iew. *See, e.g., Duckett* v. *Silberman,* 568 F.2d 1020 (2nd Cir. 1978); *Kirkland* v. *New York State Dept. of Correctional Services,* 520 F.2d 420 (2nd Cir. 1975), *cert. denied,* 429 U.S. 823, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976); *Simmons* v. *Schlesinger,* 546 F.2d 1100 (4th Cir. 1976) (withdrawn from reporter at request of court); *Jones* v. *Pitt County Bd. of Ed.,* 528 F.2d 414 (4th Cir. 1975); *Alexander* v. *Aero Lodge No. 735, Intern. Assoc. of Machinists and Aerospace Workers, AFL-CIO,* 565 F.2d 1364 (6th Cir. 1977), *cert. denied,* 436 U.S. 946, 56 L.Ed. 787, 98 S.Ct. 2849 (1978); *Anderson* v. *Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); *Middleton* v. *Remington Arms Co.,* 594 F.2d 1210 (8th Cir. 1979); *Harmon* v. *May Broadcasting Co.,* 583 F.2d 410 (8th Cir. 1978); *Clark* v. *Mann,* 562 F.2d 1104 (8th Cir. 1977); *Smallwood* v. *National Car Co.,* 583 F.2d 419 (9th Cir. 1978); *Verzosa* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 589 F.2d 974 (9th Cir. 1978); *Silberhorn* v. *General Iron Works Co.,* 584 F.2d 970 (10th Cir. 1978); *Olson* v. *Philco-Ford,* 531 F.2d 474 (10th Cir. 1976).

The defendants cite *Causey* v. *Ford Motor Company,* 516 F.2d 416 (5th Cir. 1975) and *Stewart* v. *General Motors Corporation,* 542 F.2d 445 (7th Cir. 1976), *cert. denied,* 433 U.S. 919, 53 L.Ed.2d 1105, 97 S.Ct. 2995 (1976), in an attempt to show "disharmony" in the circuits. That is not a correct statement as to *individual, disparate treatment claims* under Title VII.

In the Fifth Circuit, where (as in the present case) there is a conflict in testimony involving an *individual* litigant, the District Court's findings of discrimination or non-discrimination will be considered essentially as fact questions protected under the Rule 52(a) rationale, while conclusions regarding a *class* of litigants may be considered as conclusions of law not subject to the "clearly erroneous" rule. *See United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418, 423-24 (5th Cir. 1971), *cert. denied,* 406 U.S. 906, 31 L.Ed.2d 815, 92 S.Ct. 1607 (1972); *Bolton* v. *Murray Envelope Corp.,* 493 F.2d 191, 194 (5th Cir. 1974); *Cupples* v. *Transport Insurance Company,* 498 F.2d 1091, 1093 (5th Cir. 1974). ("In suits alleging discrimination in employment practices as to identified individuals, findings of fact by district courts may be set aside only if unsupported by substantial evidence"); *Smith* v. *Fletcher,* 559 F.2d 1014 (5th Cir. 1977); *Barnes* v. *Jones County School Dist.,* 575 F.2d 490 (5th Cir. 1978); *Armour* v. *City of Anniston,* 597 F.2d 46, 48 (5th Cir. 1979); *cf. James* v. *Stockham Valves & Fittings Co.,* 559 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034, 54 L.Ed.2d 781, 98 S.Ct. 767 (1978). The earlier (1975) *Causey* case relied upon so heavily by the defendants is not really outside this rule. In the context of the case itself, the purported distinction between "subsidiary" findings and the "ultimate" finding of discrimination is misleading, since, to the extent the Court of Appeals overturned the District Court, the decision turned on a *legal question*: whether the defendant's evidence adequately rebutted the plaintiff's prima facie case of discrimination under *McDonnell Douglas.* The *Causey* case is consequently of little precedential value.

Stewart v. *General Motors Corporation, supra,* also is not illustrative of conflicts in the circuits that would have bearing on the outcome of an individual disparate treatment case. *Stewart* was a *class action* involving the allegedly discriminatory *impact* of the defendant corporation's hiring and promotional practices. The Court of Appeals reviewed the essentially uncontradicted statistical evidence

to determine its conformity with applicable legal principles drawn from *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971). In that light, and in that light alone, the determination of discrimination against a *class* may be "as much a conclusion of law" subject to "independent examination."[10] 542 F.2d at 449. However, the Seventh Circuit has joined other circuits in observing the "clearly erroneous" standard of review in connection with identified individuals making civil rights claims. *Moore* v. *Townsend*, 525 F.2d 482 (7th Cir. 1975); *Haythe* v. *Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972).

Even if, contrary to the plaintiff's position, there is disunity in the circuits, the "clearly erroneous" rule of Rule 52(a) is the correct test for resolution of what is in essence a *credibility* issue: whether the personality reasons advanced by the defendants were the real reason for her non-promotion. There is no longer a question of the legal rule to be applied to the District Court's findings and the defendants have succeeded in directing the Court's close attention to the conflicting testimony between the defendants' witnesses from the administration and the plaintiff's witnesses regarding personality factors. What remains, then, is basically an issue of fact. As the Court of Appeals said:

> [The District Court's] opportunity for first hand observation may be especially important [in a discrimination case] such as this, where the issue of whether "personality" reasons were sexually biased. (E-4, n. 2)

The "clearly erroneous" test is therefore appropriate to the consideration of this case and no cases cited by the defendants change that result.

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[10] The Court's procedure is the equivalent of that of the Court of Appeals in this case, where the Court, reviewing the record for the second time, said it would look closely for "infection" from application of wrong legal principles. (E-4, n.2)

b. *The Defendants Cannot Be Heard To Complaint That The District Court Made No Additional Findings.*

The defendants' next argument is in essence that the terms of this Court's remand for reconsideration of the case in the "light of *Furnco*" have been evaded. The defendants are principally disturbed that the District Court made no additional findings upon remand by the Court of Appeals. The fact of the matter is that the defendants made no request for a hearing or other proceedings, submitted no request for findings or rulings and had no meaningful communication with the District Court for the entire time the case was before it the second time. Defendants' requests for relief (App. 8; App. 19) were properly denied by the District Court as too late. (D-1) The District Court's second opinion, correcting the error made in the first concerning the second and third stages of proof, satisfied the obligation imposed by the Court of Appeals' remand.

Upon a second appeal to the Court of Appeals, that Court subjected the entire record to a *McDonnell Douglas–Furnco* analysis. The correct methodology for reviewing the quantum and nature of proof has now been applied, the defendants have been pointed to evidence meeting the third phase, "pretext" requirement and the terms of this Court's remand have been completely satisfied.

c. *The Quantum And Nature Of Proof Applicable To An Academic Non-Promotion Claim Are Established In* McDonnell Douglas v. Green *And* Furnco Construction Corp. v. Waters, *And Have Now Been Appropriately Applied In This Case; Defendants Present No Compelling Reasons For Departing From That Standard In This Case And Requiring Direct Evidence Of Discriminatory Intent.*

Defendants' last argument is really an attempt to create confusion regarding the quantum and nature of proof in a

Title VII context where actually none exists. Additionally, it is to set up an evidentiary "Catch 22" in Title VII academic promotion cases that foredooms potential litigants to defeat. Although the defendants have concluded that plaintiffs need not (and indeed in most instances cannot) prove discrimination through direct evidence (Brief for Defendants-Appellants, at 25-26), the final argument in their brief appears to take the position that anything but direct evidence is mere "societal bias," which, no matter how closely linked to the decision in a plaintiff's case, can never rise to the level required to show the decision at issue was sexually premised. (*See* Pet. for Cert., at 22-34)

The obvious effect of defendants' argument would be to reduce the 1972 amendments to Title VII to a toothless tiger, in contravention of congressional intent. As the Court observed in *Davis* v. *Weidner*, 596 F.2d 726, 731 (7th Cir. 1979):

> Congress did not intend [higher education to be immunized from the requirements of Title VII]. In fact, in 1972 Congress deleted an exemption for institutions of higher education which was contained in the original equal employment opportunity legislation. *Compare* Pub. L. 88-352 § 702 (1964) *with* Pub. L. 92-261 § 3, 42 U.S.C. § 2000e-1. And the legislative history underlying this amendment reflects Congress' concern with the problem of discrimination against women in academia. *See, e.g.*, H. Rep. 92-238, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News at 2137, 2155. *See also Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169, 175 nn. 10, 11 (1st Cir. 1978). Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions. *See also, Powell* v. *Syracuse University*, 580 F.2d 1150, 1154 (2nd Cir. 1978).

Defendants cite this Court to a series of decisions which purport to show greater deference to university decisions about faculty members than either the *Davis* or the *Powell* cases prescribe. *Faro* v. *New York University*, 502 F.2d 1229 (2nd Cir. 1974), is highlighted by the defendants as support for a supposed lack of clarity and consistency in the degree to which college review committees will receive judicial scrutiny. However, the *Powell* court specifically questioned other courts' interpretations of its earlier *Faro* decision, saying courts *should* take an activist role in Title VII cases. 580 F.2d 1153. Nor is it appropriate to this inquiry for the defendants to direct this Court to non-Title VII cases cited in the *Powell* decision, which raised constitutional or other statutory claims in tenure and dismissal settings. *See, e.g., Stebbins* v. *Weaver*, 537 F.2d 939 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041, 50 L.Ed.2d 753, 97 S.Ct. 741 (1977); *Megill* v. *Board of Regents of the State of Florida*, 541 F.2d 1073 (5th Cir. 1976). If those cases show a naive faith in the motivation of college administrators, they are not an apt model for review of campus sex bias, which has been termed " 'truly appalling,' 'gross' and 'blatant.' " 580 F.2d at 1154. Particularly is that so where the subjective nature of the decisions invites subtle (though not necessarily "unconscious") forms of prejudice, calling consequently for greater, not lesser judicial probing. *See Davis* v. *Weidner, supra*, 596 F.2d at 731.

The defendants say they are "entitled to know the standard of discriminatory motive against which peer employment decisions will be judged." (Pet. for Cert. at 23-24) The answer of course lies in a disparate treatment analysis under *McDonnell Douglas* and *Furnco*; a violation of Title VII occurs when impermissible disparate treatment is found. As the Court said in *Furnco*:

> The central focus of the inquiry in a case such as this is always whether the employer is treating "some people less favorably than others because of their race, religion, sex or national origin." 438 U.S. at 577, *quoting Teamsters* v. *United States,* 431 U.S. 324, 335 n. 15, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977).

To prevail in a disparate treatment case, a plaintiff must do more than show that impact of allegedly non-discriminating practices fall more harshly on her class, *Teamsters* v. *United States, supra,* 431 U.S. at 335, n. 15; she must demonstrate that the discrimination was based upon illegitimate, rather than legitimate reasons and that the reasons, if any, given by the employer, are mere "pretexts" for a sexually premised decision. The three-step *McDonnell Douglas – Furnco* methodology is well-suited to this inquiry. On the other hand, direct evidence of discriminatory animus is not required, *see Johnson* v. *University of Pittsburg,* 359 F.Supp. 1002, 1007 (W.D. Pa. 1973); motivation can be determined from inferential evidence, such as statistics, the employer's general policies regarding the employees in the plaintiff's protected class, treatment before and after the plaintiff's complaint of discrimination, and an evaluation of the credibility of defendants' "reasons" for the decision. *See McDonnell Douglas* v. *Green, supra,* 411 U.S. at 804-05; *see also Furnco* v. *Waters, supra,* 438 U.S. at 579-80; *Teamsters* v. *United States, supra,* 431 U.S. at 335, n. 15. This is a clear mandate to meet plaintiff's ultimate burden through inferential and circumstantial proof.

The above-cited principles from *McDonnell Douglas* and *Furnco* have been used to prove an employment discrimination case under Title VII as recently as last month, where the District of Columbia Circuit Court of Appeals suggested in *Davis* v. *Califano,* 21 FEP Cases 273 (D.C. Cir. 1979) that statistical analysis was relevant to a showing of intent to discriminate and that close judicial scrutiny was indicated where subjective promotional criteria could easily mask an "unlawful bias":

> Appellant's statistical data included in category number two also constitutes probative evidence from which discriminatory intent might be inferred. Absent discriminatory promotion practices, similar promotion rates for male and female employees in the higher job classifications and grade levels who possess the minimum objective qualifications necessary for those positions would be expected. Dr. Davis' statistical evidence indicated that male GS employees in the higher grades in NIH and NHLBI were promoted at a substantially higher rate than similarly situated female employees.
>
> Appellant's statistical prima facie case is bolstered by the subjective and ad hoc nature of Appellee's promotion decisions. . . . This Court agrees with the Eighth Circuit Court of Appeals in *Rogers* v. *International Paper Co.,* 510 F.2d 1340, 10 FEP cases 404 (8th Cir. 1975), *vacated on other grounds,* 423 U.S. 809, 11 FEP Cases 576 (1975), *reinstated with modification on other grounds,* 526 F.2d 722, 11 FEP Cases 1000 (8th Cir., 1975), which stated:
>
> > Greater possibilities for abuse . . . are inherent in subjective definitions of employment selection and promotion criteria. . . . [I]t is especially important for courts to be sensitive to possible bias in the hiring and promotion process arising from such subjective definition of employment criteria.

> Appellee's promotion procedures are highly suspect and must be closely scrutinized because of their capacity for masking unlawful bias.[11]

These principles cut a clear path of proof through the thicket that defendants try to create by reference to *Washington* v. *Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). (Pet. for Cert. at 29-31) The *Washington* case was a class action brought by black police officers challenging the validity of a written personnel test. Plaintiffs alleged that the test discriminated against them by excluding disproportionately large numbers of their group. The case was brought under constitutional and Title VII theories. The Court's discussion, quoted out-of-context in defendant's brief, is simply to the effect that intent must be shown

[11] *See also Jones* v. *Trailways Corp.*, 20 FEP Cases 1541, 1544 (D.D.C. 1979):

> When faced with an employer's reasons for its allegedly discriminatory treatment, plaintiff in a Title VII action ordinarily must rely on circumstantial rather than direct evidence from which to infer racial motivation. *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169, 16 FEP Cases 378 (1st Cir. 1978), *vacated on other grounds*, 439 U.S. 24, 47 LW 3330, 18 FEP Cases 520 (Nov. 13, 1978); *Marquez* v. *Omaha District Sales Office*, 440 F.2d 1157, 1162, 3 FEP Cases 275 (10th Cir. 1971); *Sawyer* v. *Russo*, 19 EPD ¶ 8996, 19 FEP Cases 44 (D.D.C. 1979). Such racially discriminatory purpose must play some part in the challenged actions, but plaintiff need not prove it played the only part or even the controlling one. See*McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285, 12 FEP Cases 1577 (1976); *Berio* v. *EEOC*, 18 EPD ¶ 8847, 19 FEP Cases 168 (D.D.C. 1979). See also *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 265-66 (1977); *Miller* v. *Poretsky*, 595 F.2d 780, 788 (D.C. Cir. 1978). A court may conclude that discriminatory intent was present if plaintiff has shown a pattern or series of actions not explainable on other grounds, see *Arlington Heights, supra* at 266; or if comparably situated white employees were treated differently from plaintiff, *McDonnell Douglas, supra* at 804, or even from the circumstances of plaintiff's treatment combined with more general evidence on defendant's relevant minority employment practices. *Id.* at 804-05.

(although it may sometimes be inferred from disparate impact) under the constitutional basis for the claim but not under the Title VII, disparate *impact* theory under *Griggs* v. *Duke Power Co., supra*, 401 U.S. 424. All of the statements can be harmonized with the view that intent must be shown, but may be shown inferentially—among other ways through unexplained differences in impact—in disparate treatment claims under Title VII. The confusion noted by the defendants' brief, is artificially created.

The fact is that there is no longer a legitimate legal argument in this case. Defendants are simply left with their unsupportable contention that the plaintiff did no more than demonstrate "unconscious societal bias." (*E.g.*, Pet. for Cert. at 33) Her evidence that the non-promotion decision was sexually premised fully met the rigorous *McDonnell Douglas – Furnco* criteria. In summarizing only a part of this evidence:

1. Dr. Sweeney presented evidence that the New Hampshire Commission for Human Rights and the Equal Employment Opportunity Commission both found probable cause for her complaint of discrimination. (App. IV 121, Exs. 53, 54)

2. She presented impressive statistical evidence of sex discrimination in hiring, promotion and salaries in the highest academic ranks. (Exs. 58 and 59; F-23)

3. She presented evidence of the ineffectiveness of the affirmative action program, *see Johnson* v. *University of Pittsburg*, 359 F.Supp. 1002 (W.D. Pa. 1973), and the lack of assistance and concern on the part of the program coordinator in pursuing her claim; in fact, the program coordinator sought to intimidate the plaintiff with answering interrogatories from the New Hampshire Commission for Human Rights, regarded the contention of discrimination as frivolous, and

sought assistance from a colleague in repressing the "form of anarchy" represented by Dr. Sweeney's claims of discrimination. (F-17, 19)

4. An expert testified as to the pattern of discrimination at the university and that it had an impact on promotional decisions of females in general and the plaintiff in particular. (App. III 249; F-21)

5. Other witnesses testified that Dr. Sweeney was among the top third of full professors at Keene and qualified for promotion by objective measurement of teaching ability, publications, and committee work; they testified that she was not rigid and old-fashioned or had trouble working with people as portrayed in the defendants' "explanation." (F-19)

6. The "personality" reasons given for non-promotions are not those stated in the Faculty Maual. (App. II 113; App. III 117; App. III 143; App. III 213; App. III 99)

7. The Court of Appeals' examination of the record elicited additional facts that support an inference of bias on the part of the plaintiff's department chairman. (E-12-13, n. 12 and n. 13)

8. Additionally there was evidence of animosity, which inferentially could have been sexually premised, on the part of specific individuals, including Dean Davis (F-4-5), and Dr. Quirk, head of the FEAC. (App. III 372-73)

9. The "personality" reasons eventually developed by the administration, since untrue, support an inference that the 5-man FEAC and administration saw her as a sexual stereotype, and that sex bias, not personality was the premise of the decision.[12]

[12] *See Hill* v. *Nettleton*, 455 F.Supp. 514 (1978):
Those in authority saw Mary Alice Hill more as a symbol of her sex than as a member of the faculty and she suffered from that perception. It resulted in her being treated less favorably because of her sex and that is a violation of the law. *Furnco Construction Corporation* v. *Waters*, 455 F.Supp. at 519.

10. The finding by the FAC that Dr. Sweeney had been unprofessionally treated by the administration by refusing to explain her non-promotion adds weight to her claim of discrimination. (F-12)

11. The record as summarized by the District Court shows a sequence of events indicative of an intent to discriminate and a fertile factual setting for the view that the "reasons" were what *McDonnell Douglas* terms "a coverup for a [sexually] discriminatory decision," 411 U.S. at 805; no meaningful explanation for the non-promotion decision, followed by a complaint of discrimination, followed by development of an "explanation" by the Dean, head of the FEAC and President of the College for the previously unexplained action, followed by promotion with unchanged credentials or personality. (*E.g.*, F-10, Ex. 32, F-16, E-9) *Cf. McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 804.

The cumulative effect of this evidence and other evidence in the record properly was that Dr. Sweeney was denied a promotion because of her sex, the critical determination in this case.

Conclusion

The legal issues in this case were resolved with the Court's remand, the terms of which have been satisfied by the District Court and met by the Court of Appeals in its complete review of the record.

The defendants raise only a factual dispute regarding the outcome of this case. The Rule 52(a) "clearly erro-

neous'' standard of review is well-settled for Title VII disparate treatment claims, as is the rule that a plaintiff may meet her ultimate burden through inferential forms of evidence.

The respondent requests that the Petition for Certiorari be denied.

Respectfully submitted,

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